Case C-410/20

Request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

2 September 2020

Referring court:

Audiencia Provincial de A Coruña (Spain)

Date of the decision to refer:

28 July 2020

Appellant:

Banco Santander, SA

Respondent:

J.A.C.

M.C.P.R.

Subject matter of the main proceedings

Appeal brought by Banco Santander S.A. (a company having acquired by merger Banco Popular Español, S.A.) which raises the question of the continued existence or viability of an action for nullity by reason of an error of consent which is directed against the acquisition of shares issued and offered to the public by a financial institution (in this instance, Banco Popular Español, S.A.) on the occasion of a capital increase, in the case where the investor brings the action following the conclusion of the procedure for resolving the issuing entity in the course of which all of the shares into which that entity's share capital was divided were redeemed.

Subject matter and legal basis of the request for a preliminary ruling

The point of uncertainty raised by the referring court relates to the compatibility of the annulment procedure provided for in Article 1300 of the Spanish Código Civil (Civil Code), a remedy based on case-law which is aimed at obtaining the

reimbursement of money invested in shares issued by a financial entity on the occasion of a public offer to subscribe, with the principles governing the resolution of a financial institution set out in Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, in particular the principle that shareholders must bear any losses.

Questions referred for a preliminary ruling

1. Where, in the course of a procedure for the resolution of a financial institution, all of the shares into which the share capital was divided have been redeemed, must Articles 34(1)(a), 53(1) and (3) and 60(2)(b) and (e) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 be interpreted as meaning that they preclude persons having acquired their shares a number of months prior to the start of the resolution procedure, on the occasion of a capital increase with a public offer to subscribe, from bringing claims for compensation or claims having equivalent effect which are based on defective information in the issue prospectus against the issuing institution or against the institution emerging from a subsequent merger by acquisition?

2. In the same situation as that referred to in the previous question, do Articles 34(1)(a), 53(3) and 60(2)(b) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 preclude the courts from imposing on the issuing institution or on the institution that succeeds to it universally any obligations to reimburse the equivalent value of the shares subscribed and to pay interest as a result of the retroactively effective (*ex tunc*) declaration as to the nullity of the share subscription contract, pursuant to claims brought after the institution has been resolved?

Provisions of EU law relied on

Article 267 TFEU

Articles 34(1)(a), 53(1) and (3) and 60(2)(b) and (e) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC

Regulation (EU) No 806/2014: Articles 18, 22 and 24

Judgment of the Court of Justice of the European Union (Second Chamber) of 19 December 2013, Case C-174/12 (EU:C:2013:856, paragraphs 44 and 68)

Provisions of national law relied on

Law 11/2015 of 18 June 2015 on the recovery and resolution of credit institutions and investment firms

Royal Legislative Decree 4/2015 of 23 October 2015 approving the recast text of the Law on the Securities Market

Civil Code: Articles1300, 1301, 1303, 1307, 1309 and 1314

Decision of the (Spanish) Fund for Orderly Bank Restructuring (FROB) of 7 June 2017 (published in the Boletín Oficial del Estado (Spanish Official State Gazette) of 30 June 2017): third legal basis and operative part

Brief presentation of the facts and main proceedings

1 In June 2016, Banco Popular Español, S.A. carried out a capital increase with a public offer to subscribe.

2 The applicant spouses, who are retail customers, invested EUR 6 890 in the subscription of 5 512 shares offered in the issue.

3 In the last quarter of 2016, Banco Popular Español, S.A. made significant adjustments to the value of its assets resulting in a loss for the year of EUR 3 485 million.

4 On 3 April 2017, Banco Popular Español, S.A. informed the Comisión Nacional del Mercado de Valores (Spanish National Securities Market Commission) (CNMV), as a relevant fact, that there were certain irregularities in the annual accounts for FY 2016, although it was of the view that these would not have a significant impact on the 2016 annual accounts and did not therefore warrant a reformulation of those accounts.

5 On 7 June 2017, it was decided that Banco Popular Español, S.A. should be resolved. All of the shares into which the bank's share capital was divided were redeemed, without consideration.

6 In March 2018, J.Á.C and M.C.P.R, who lost the entirety of their investment as a result of the resolution and redemption of those shares, brought against Banco Popular Español, S.A. an action seeking a declaration as to the nullity of the share acquisition contract by reason of an error invalidating their consent, inasmuch as that consent had been given on the basis of information relating to the company's accounts and net worth as contained in the issue prospectus that was inaccurate and incomplete, or, in the alternative, by reason of fraud consisting in the

deliberate misrepresentation and concealment of relevant information concerning the company's financial position. In the application, they requested that the defendant institution be ordered to pay them the sum of EUR 6 890 plus the statutory interest which had accrued since the date of payment.

7 In its defence, the Banco Santander S.A. put forward the argument, among others raised in opposition to the claim, that the process of resolving Banco Popular was decided upon and implemented in accordance with the relevant legislative instruments, the principal purpose of which is to ensure that any difficulty in which a financial institution finds itself does not have an impact on taxpayers' money by requiring that any losses sustained should be borne by the shareholders and creditors of the institutions concerned. In accordance with the bail-in principle, it falls in the first place to the shareholders and then to the holders of certain financial instruments to bear the losses of institutions in crisis.

8 The judgment at first instance upheld the action, declared the share acquisition to be void by reason of an error of consent and ordered that the money invested be reimbursed together with statutory interest.

9 Banco Santander S.A. appealed the judgment at first instance.

Essential arguments of the parties to the main proceedings

10 The applicant at first instance and respondent at second instance submitted, in essence, that the action for a declaration of nullity which has been brought is independent of the resolution of Banco Popular and the effects thereof. It also argued that it follows from the case-law of the Court of Justice of the European Union — from which it cited the judgment of 19 December 2013, Case C-174/12, *Alfred Hirmann* v *Immofinanz AG* — that a share subscription contract may by cancelled by reason of an error of consent where that error is substantive and was decisive in the giving of consent.

11 Banco Santander, defendant and appellant, maintains, in essence, that the question raised by the court can be found in Spanish law itself, more specifically in Law 11/2015 of 18 June 2015 on the recovery and resolution of credit institutions and investment firms, which transposed Directive 2014/59/EC of the European Parliament and of the Council of 15 May 2014 into domestic law. It takes the view that the application, in so far as it seeks compensation, is attempting to evade the effects of the resolution, which are that losses must be borne by the holders of the instruments of ownership through which the bail-in was carried out.

Brief presentation of the grounds for the request for a preliminary ruling

12 Settlement of the dispute calls for clarification, in the first place, as to whether the same independence of the EU rules on liability for prospectuses and relevant facts from the rules that seek to ensure the intangibility of share capital that was held to

obtain by the Court of Justice of the European Union (Second Chamber) in the judgment of 19 December 2013 may also be relied on in order to maintain those same actions — or others of a different nature from, but having effects equivalent to, actions for a declaration of voidability by reason of error — in opposition to the principles and rules of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, in particular the principle to the effect that shareholders must bear the losses sustained and the rules governing the specific effects of a bail-in, including full redemption of shares and other instruments of ownership.

13 The second point of uncertainty relates to the action for a declaration of voidability and, in part, the meaning and scope of the exception for any 'liability already accrued' referred to in Article 60(2)(b) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014. In the view of the referring court, it is clear that an obligation to reimburse the value of shares which has not even been asserted by a shareholder before the process of resolving the bank is started cannot be a liability already accrued; if, however, voidability were a permissible remedy, the fact that a declaration of nullity is retroactive would place the claim for reimbursement asserted by those having purchased shares at a point in time prior to that of the resolution of the issuing bank, meaning ultimately that the investors in the case at issue in the main proceedings would have to be treated as creditors to the bank rather than as shareholders.